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(1)



In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 184

HENRY A. KIESELBACH AND MRS. OLGA M.
KIESELBACH, PETITIONERS

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL
REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE THIRD
CIRCUIT

MEMORANDUM FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 33-37) is reported at 44 B. T. A. 279. The opinion of the circuit court of appeals (R. 42-50) is reported at 127 F. (2d) 359.

JURISDICTION

The judgment of the circuit court of appeals was entered April 7, 1942 (R. 50). The petition for a writ of certiorari was filed June 27, 1942. The

jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the interest awarded in a condemnation proceeding on the value of the land at the date of the taking, running from the date of the taking until entry of the final decree, is taxable as ordinary income.
2. Whether, for the purpose of determining the percentage of gain to be recognized under Section 117 of the Revenue Act of 1936, real estate to which the City of New York purported to take title on January 3, 1933, pursuant to Section 976 of the city charter, should be treated as having ceased to be "held" by the taxpayer upon that date although just compensation was not paid until 1937.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, pp. 8-12, *infra*.

STATEMENT

The facts were stipulated (R. 27-33) and found by the Board as stipulated (R. 34). They may be summarized as follows:

On April 2, 1927, the petitioner Henry A. Kieselbach inherited from his father a parcel of real property in the City of New York. In 1930 the City began condemnation proceedings in the Supreme Court of New York and an order was entered

authorizing the taking of the property and providing that just compensation would be determined by the court. Petitioners filed a formal application for compensation (R. 34).

On December 16, 1932, the Board of Estimates and Apportionment of the City of New York passed a resolution that fee title to the property should pass to the City on January 3, 1933. This was in accordance with Section 976 of the New York City Charter which provided that such a resolution should be effective to vest title in the City (See Appendix, pp. 11-12, *infra*). The City took possession on the latter date, and rents thereafter accruing were collected by or turned over to the City (R. 32, 34-35).

On March 31, 1937, the court entered a final decree in the condemnation proceeding awarding \$73,246.57 to the petitioners as "just compensation". The amount was computed by adding interest at 6% per annum from January 3, 1933, to the \$58,000 principal amount. The award was paid on May 12, 1937. No deposit or security for the payment of compensation had been given by the City prior to final payment (R. 35).

The Commissioner in his deficiency notice determined (1) that the portion of the award computed as interest was taxable as ordinary income in 1937, and was not part of the price contributing to capital gain (R. 10-11), and (2) that the condemned property had been held by petitioners only until

January 3, 1933, when the City took possession and title under the resolution of the Board of Estimates and Apportionment (R. 12-13). The Board of Tax Appeals set aside the Commissioner's determination on both points (R. 36-37). On appeal the circuit court of appeals reversed the decision of the Board and affirmed the Commissioner's determination (R. 42-50).

ARGUMENT

1. The decision of the court below is in conflict with the decisions of the Circuit Court of Appeals for the Second Circuit in *Seaside Improvement Co. v. Commissioner*, 105 F. (2d) 990, and *Commissioner v. Appelby's Estate*, 123 F. (2d) 700, upon the question of whether the portion of a condemnation award computed as interest from the date of taking is taxable as ordinary income or as part of the price received upon exchange of a capital asset. The court below recognized the conflict (R. 47). Accordingly, although we believe the decision below to be correct, we do not oppose the granting of certiorari with respect to this issue.

2. The second question presented, however, does not require further review. The court below correctly rejected petitioners' contention that they "held" the property until the award of compensation was paid on May 12, 1937, notwithstanding that the City purported to take title on January 3, 1933, and did in fact hold possession and collect the rents

after that date. At the time of the taking the Greater New York City Charter allowed the City to condemn land and, in Section 976, authorized the Board of Estimates and Apportionment to fix the date on which title should pass. (See Appendix, pp. 11-12, *infra*.) The owner had the right to a judicial determination of what was "just compensation" and to enforce the award against the City by court proceedings. He also was entitled to interest on the principal amount of the award, the interest to run from the date fixed by the Board of Estimates and Apportionment for the transfer of title. Greater New York City Charter, Secs. 970, 976, 981, 995, 996. In the instant case, the resolution fixed January 3, 1933, as the date upon which title should vest in the City and upon that date the City in fact took possession of the property. Consequently, it is plain that unless the statutory provisions were invalid, the petitioners ceased to hold the property on January 3, 1933.

Before the Board of Tax Appeals and in the court below petitioner contended that these provisions of the city charter were unconstitutional on the ground that a taking is invalid unless preceded by the payment of just compensation. But the New York Court of Appeals has held squarely that there is no violation of the state constitution in taking property prior to the payment of compensation provided that adequate provision is made for the prompt determination of just compensation and for payment of the award. *Kahlen v. State of New York*, 223 N. Y. 383. In-

deed, in *A. F. & G. Realty Co. v. City of New York*, 313 U. S. 540, the very case upon which petitioners rely for a conflict, the state courts declared that title vested in the City on the date fixed by a resolution of the Board of Estimates and Apportionment acting under Section 976. *In re Bronx River Parkway*, 284 N. Y. 48, 52; 259 App. Div 552, 553. Likewise, it is settled that the federal constitution does not forbid a state to authorize a city to take absolute title at the outset provided the state recognizes the absolute right of the owner to recover just compensation in a suit against the city. *Sweet v. Rechel*, 159 U. S. 380, 404; *Phillips v. Commissioner*, 283 U. S. 589, 597. *Garrison v. City of New York*, 21 Wall. 196, is consistent with those decisions; the Court said simply that payment of compensation "or provision for its payment must precede the taking (21 Wall. at 204).

This second question rests upon a tenuous collateral point of constitutional law, which petitioners may well lack standing to raise in this proceeding.¹ It is unrelated to the first question presented. There is no conflict of decisions upon it and it is not important in the administration of the revenue laws.

¹ It would seem that after participating without objection in a condemnation proceeding conducted on the assumption that title passed on January 3, 1933, and accepting an award made on that basis, petitioners lack standing now to assert that that section is invalid. See *Scholey v. Rew*, 90 U. S. 331; *Great Falls Mfg. Co. v. The Attorney General*, 124 U. S. 581; *Wall v. Parrot Silver & Copper Co.*, 244 U. S. 407.

In respect to the second question presented, therefore, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY, 1942.

APPENDIX

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SEC. 22. GROSS INCOME.

(a) *General Definition.*—“Gross income” includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

SEC. 117. CAPITAL GAINS AND LOSSES.

(a) *General Rule.*—In the case of a taxpayer, other than a corporation, only the following percentages of the gain or loss recognized upon the sale or exchange of a capital asset shall be taken into account in computing net income:

100 per centum if the capital asset has been held for not more than 1 year;

80 per centum if the capital asset has been held for more than 2 years;

60 per centum if the capital asset has been held for more than 2 years but not for more than 5 years;

40 per centum if the capital asset has been held for more than 5 years but not for more than 10 years;

30 per centum if the capital asset has been held for more than 10 years.

(b) *Definition of Capital Assets.*—For the purposes of this title, "capital assets" means property held by the taxpayer (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business.

Greater New York Charter, Chapter XVII, Title 4, Article I:

The city may acquire real property for streets, parks, et cetera.

SEC. 970. The city of New York may acquire title either in fee or to an easement, as may be determined by the board of estimate and apportionment, for the use of the public, to all or any of the real property required for streets and court-yards abutting streets, and for parks, parkways, playgrounds, approaches to bridges and tunnels and sites or lands above the water for bridges and tunnels, and sites or lands above or under water for all improvements of the navigation of waters within or separating portions of the city of New York for the improvement of the waterfronts of the city of New York, or part or parts thereof, heretofore duly laid out upon the map or plan of the city of New York, of the city of Brooklyn, or Long Island City, or of any of the territory consolidated

with the corporation heretofore known as the mayor, aldermen and commonalty of the city of New York or hereafter duly laid out upon the map or plan of the city of New York, as herein constituted, and cause the same to be opened, or acquire title as above stated to such interests in real property as will promote public utility, comfort, health, enjoyment, or adornment, the acquisition of which is not elsewhere provided for. The board of estimate and apportionment may specify what use is required of the real property which it may determine shall be acquired for public use, and the extent of such use, and may direct the same to be acquired whenever and as often as it shall deem it for the public interest so to do. * * * In proceedings authorized by the board of estimate and apportionment after the first day of January, nineteen hundred and seventeen, the compensation to which the owners of real property to be acquired for the use of the public for the purposes specified in this section, shall be ascertained and determined by the supreme court without a jury in the manner and according to the procedure prescribed by this title, and on and after said date the city of New York shall make application to the court, or cause application to be made to the supreme court in a county within the city of New York and within the judicial district in which the real property to be acquired is situated, to have the compensation, which should justly be made to the respective owners of the real property proposed to be acquired, ascertained and determined by the said court, without a jury, and to have the cost of the improvement, or such portion thereof as the board of estimate and apportionment shall direct, assessed by the court

upon the real property deemed by the board of estimate and apportionment to be benefited thereby. (amended by L. 1922, ch. 563.)

Vesting of title in the city to real property taken for streets or parks or other purposes.

SEC. 976. The title to the real property lying within the lines of any improvement, authorized herein, shall be vested in the city of New York upon the date of the filing of the damage map in the proceeding, provided, however, that the board of estimate and apportionment may direct, by a resolution adopted by a three-fourths vote, that the title shall be vested in the city of New York upon the date of the entry of the order granting the application to condemn or upon the filing of the final decree, as provided for in this title, or upon such other date as may be specified in said resolution, but not later than the date of the filing of the final decree. Upon the date of the entry of the order granting the application to condemn, or of the filing of the damage map in the proceeding, as the case may be, or upon such subsequent date as may be specified by resolution of said board, the city of New York shall become and be seized in fee of or of the easement, in, over, upon or under, the said real property described in the said order or damage map, as the board of estimate and apportionment may determine, the same to be held appropriated, converted, and used to and for such purpose accordingly. Interest at the legal rate upon the sum or sums to which the owners are justly entitled upon the date of the vesting of title in the city of New York, as aforesaid, from said date to date of the final decree shall be awarded by

the court as part of the compensation to which such owners are entitled. The reversal on appeal of the final decree shall not divest the city of title to the real property affected by the appeal. Upon the vesting of title the city of New York, or any person or persons acting under its authority, may immediately, or any time thereafter, take possession of the real property so vested in the city, or any part or parts thereof, without any suit or proceeding at law for that purpose.

* * * * *

The title in fee acquired by the city of New York to real property required for all purposes provided for in this title, except street and courtyard purposes, shall be a fee simple absolute. (*As amended by L. 1932, ch. 391.*)



